# Supreme Court of the United States

**OCTOBER TERM, 1963.**

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## No. 157

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**R. B. PARDEN, ET AL.,**
**Petitioners,**

**versus**

**TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT, ET AL.,**
**Respondents.**

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## PETITION FOR REHEARING AND BRIEF IN SUPPORT OF PETITION FOR REHEARING.

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# PETITION FOR REHEARING.

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*To the United States Supreme Court and the Justices thereof:*

The State of Alabama, the Respondent in the above entitled cause, presents this, its petition, for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

## I.

The decision in this cause decides important constitutional questions affecting the relationship of each State to the federal government; the relationship of

the Legislature to the Judiciary; the means by which a known constitutional right may be waived; and the power of Congress to condition an act or a course of conduct involving commerce upon the forfeiture of a constitutional right. The commerce power of Congress vis-a-vis a State's constitutional immunity from suit clash head on for the first time.

Issues affecting the status of the States in our federal system have been decided by the vote of one member of this Court without affording but one State an opportunity to be heard.

Although this case falls within the spirit of 28 U.S.C. 2403 and within the letter of Supreme Court Rule 33(b), the Solicitor General was not given an opportunity to express the views of the United States. The Solicitor General may share the same views as the four Justices who dissent here and the four Judges who this Court now reverses.

Issues that affect the foundation of our federal system should not be resolved by one member of this Court on the basis of arguments presented by only one of the States.

The sharp division in this Court and the unanimity in the lower courts should cause this Court to afford the Attorneys General of the several States, the Solicitor General and others interested in preserving our federal system and constitutional rights an opportunity to be heard on the important issues presented in this cause.

Attorneys General of several States have expressed their dissatisfaction with the opinion of this Court and several have indicated an intention of filing an amicus brief in support of this petition; others are unable to prepare briefs because of limitations of time.

## II.

The majority fails to accommodate the power of Congress to regulate interstate commerce with a State's constitutional immunity from suit.

The power of Congress to regulate commerce and a State's immunity from suit may be accommodated if this Court will allow Congress to intelligently consider the problem.

No question of a State's immunity from suit at the hands of an individual need arise. Congress has made the accommodation in the past by providing for actions by the United States against interstate carriers to compel compliance with the congressional policy. Congress might require a State, as Alabama has voluntarily done, to provide insurance with a direct action against an insurance company to compensate employees for industrial accidents. A constitutional issue would not be presented in this cause if the majority had not inferred something that Congress never considered, that Congress intended to condition a State's engaging in commerce by rail upon the State waiving its constitutional immunity from suit.

Had Congress passed a bill directly conditioning a State's engaging in interstate commerce by rail upon the forfeiture of the State's constitutional immunity from suit by as narrow a margin as this Court decides issues here, the President would have had the final responsibility to determine whether the bill would become law.

The majority's refusal to accommodate the federal system, legislative, judicial and executive, creates the constitutional issues here presented.

## III.

Proposed substitute amendments show that the Eleventh Amendment, like the first ten Amendments, is an explicit limitation on the power of the federal government. Proffered amendments which would have allowed a State to be sued in a federal court in cases arising "under treaties" and where a State failed to provide for a suit in its own courts were soundly defeated 3 *Annals of Congress* 30, 476.

The defeat of the proffered amendments and the all-embracing terms of the Eleventh Amendment establish that Congress does not have the authority to confer upon the judiciary power to entertain a suit against a State by an individual against the *will* of the State. An unwitting waiver will not suffice to confer "judicial power".

## IV.

The State of Alabama amended its Constitution to allow the State to construct the public facilities at Mobile in furtherance of the national policy enunciated by Congress in the Rivers and Harbors Appropriation Act of 1919 and the Merchant Marine Act of 1920. Congress did not inferentially infer that Alabama would waive its sovereign immunity from suit by accommodating national policy. This Court should not impose a forfeiture upon a State for actions of the State in furtherance of national policy when Congress did not peripherally suggest that the State would forfeit a constitutional right and be reduced to the status of a mere corporation by spending its funds to effect national policy.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit be upon further consideration affirmed.

Respectfully submitted,

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WILLIS C. DARBY, JR.,
Attorney for Respondents,
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## CERTIFICATE OF COUNSEL.

I, counsel for the above-named State of Alabama, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIS C. DARBY, JR.,
Counsel for Respondents.

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## BRIEF IN SUPPORT OF PETITION FOR REHEARING.

The question of whether the State of Alabama waived its immunity from suit should be decided on the basis of the facts and law at the time the waiver is alleged to have occurred. The State, if it waived its immunity, must have waived its immunity on the status of the law and facts as they existed when the State commenced operation of its railroad.

The circumstances surrounding the entry of Alabama into the works of internal improvements in and about the development of a seaport at Mobile, Alabama, demonstrate that Alabama should not be deemed to have waived its immunity from suit by operating a railroad in interstate commerce.

Section 93 of the Constitution of Alabama 1901, provides:

> The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual association, or corporation.

"The framers of the Constitution were determined that financial disaster should not come to the State through the acts of reckless officials by subscription to enterprises supposed to serve the public good, yet in truth dominated by private interest." *In Re Opinion of the Justices*, 247 Ala. 66, 22 So. 2d 521, 525.

In the Rivers and Harbors Appropriation Act of 1919, 40 Stat. 1275, 1286 (1919). Congress adopted the following policy:

> It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned, and regulated by the municipality, or other public agency of the State and open to the use of all on equal terms, and with the view of carrying out this policy to the fullest possible extent the Secretary of War is hereby vested with the discretion to withhold, unless the public interests would seriously suffer by delay, monies appropriated in this Act for new projects adopted herein, or for the further improvement of existing projects if, in his

> opinion, no water terminals exist adequate for the traffic and open to all on equal terms, or unless satisfactory assurances are received that local or other interests will provide such adequate terminal or terminals.

In furtherance of this national policy Alabama acted swiftly. In September, 1919, the Legislature proposed an amendment to Section 93 of the Alabama Constitution providing that the prohibition of Section 93 of the Constitution "shall not apply to the promotion, development or operation of harbors or seaports within the State or its jurisdiction, provided, further, that any such work or improvements shall always be and remain under the management and control of the State . . ." *General Acts of Alabama 1919*, p. 908.

The people of Alabama defeated this amendment at the polls.

The Governor of Alabama called a Special Session of the Legislature in 1921 and again submitted an amendment to establish a State port at Mobile. *General and Local Laws of Alabama Special Session 1921*, p. IV. The Governor's message to the Legislature referred to the necessity of equipping the Port of Mobile to insure the continuation of federal appropriation for harbor and channel. Id. at p. VI.

The Special Session of the Legislature proposed another amendment to Section 93 to allow the construction of a port at Mobile, Alabama, limiting, however, the amount of the credit of the State to be pledged to ten

million dollars. The amendment was ratified by the people of the State of Alabama and became Amendment No. 12 to the Constitution of Alabama on November 22, 1922. Alabama Constitution Amendment 12.

One of the primary purposes for the development of rivers and harbors by the federal government has been to provide navigable waterways for the purpose of reducing railroad rates. 57 Cong. Rec. 3543, 3549 (1919).

In the Merchant Marine Act of 1920, Congress authorized the United States Shipping Board and the Secretary of the Army "to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports. 41 Stat. 992, 46 U.S.C.A. 867.

In 1923 the Legislature of Alabama passed the first enabling Act to develop the Port of Mobile by constructing wharves, docks and warehouses and a terminal railway to connect the State public facilities with existing railroads. General Acts of Alabama 1923, p. 330.

The State operated railroad insured that all shippers and all railroads would have equal access to the public

owned facilities in Mobile. The primary purpose of a public port, a port open to all on equal terms, would have been defeated had one railroad or one group of railroads been allowed to serve the maritime facilities being constructed by the State pursuant to congressional policy.

The Terminal Railway Alabama State Docks began operations on December 1, 1927, under a certificate of convenience and necessity from the Interstate Commerce Commission.

At the dedication ceremonies of the Alabama State Docks on June 25, 1928, Justice Hugo Black, then Senator Black, described the mammoth docks as "marking a great epoch in the progress of Alabama." The Mobile Register, June 26, 1928, p. 5, col. 6.

Nothing whatsoever appears in the debates of Congress pertaining to the Federal Employers' Liability Act, the Rivers and Harbors Appropriation Act of 1919 or in the Transportation Act of 1920 that would inferentially suggest that the Sovereign State of Alabama would be stripped of one of its primary attributes of sovereignty in accommodating the national policy by constructing a great terminal at Mobile with the funds of the citizens of the State of Alabama. It is doubtful that the people of the State of Alabama would have amended their Constitution to permit construction of the State's facilities at Mobile had they known they were forfeiting the State's immunity.

The Interstate Commerce Commission did not see fit to condition the State's certificate of convenience and necessity on the State's waiving its immunity from suit. Had the Commission done so, it is likely that the State would not have constructed the railway.

Did Mr. Justice Black on June 25, 1928, realize that by constructing the "'mammoth docks" the Sovereign State of Alabama had waived its immunity from suit.

Emphasizing the question of whether the State of Alabama waived its immunity in 1927, it is significant that when Mr. Chief Justice Warren occupied the highest executive position of the State of California, California successfully contended that the Railway Labor Act did not apply to the State Belt Railroad, a common carrier owned and operated by the State of California. *State v. Brotherhood of Railroad Trainmen*, (Cal. App.) 37 Cal. 2d 412, 232 P. 2d 857, cert. deni. 342 U.S. 876.

In the event a State's constitutional immunities from suit are to be "waived" by activities of the State, such waiver should in every case be imposed in advance in clear and concise language by Congress.

The powers of the federal government were distributed between the Legislature, Executive and Judiciary for reasons that have apparently been overlooked by the majority.

Congress speaks the will of the people. The Congressmen and Senators have intimate contact with their

constitutents. Congressmen and Senators fail in their bids for re-election when they do not follow the will of the majority. Judges are answerable to no one. In considering legislation, all manner of people are heard by the Committees of Congress; the course of legislation is in fact directed by the actions of the public while Congress is in session. Judicial decisions are made behind closed doors free from public pressures and opinion.

Had Congress considered conditioning a State's engaging in interstate commerce on the State's being subject to suit in a federal court, each of the States would have had an opportunity to be heard in Congress, indeed, each of the States would have been represented by its two Senators and in the House of Representatives. The will of the people would have been made known to those deliberating. Here, the majority opinion by one vote in 1964 determines whether the State was stripped of its sovereign immunity by occurrences in the 1920s. Indeed, in considering the question of whether Congress or the Court should declare that a constitutional defense has been eliminated, it is likely that the Court might not have decided this issue in the same manner a few years ago. Is there any question that Mr. Justice Frankfurter would have held that the State of Alabama was immune from this suit? *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 283. Should the waiver of a constitutional right alleged to have occurred in the 1920s be determined on the basis of when the question is decided by this Court or upon the facts and law

as they existed at the time the waiver is alleged to have occurred?

The State of Alabama is not endeavoring to deprive any employee of the Terminal Railway Alabama State Docks of just compensation for an injury received in the course of his employment. The State of Alabama through its Legislature, without any prompting or coercion from any branch of the federal government, provided a means whereby each of the Petitioners here may have a judicial determination in a court of law with respect to their alleged injuries.

The Legislature of the State of Alabama has provided that the Alabama State Docks Department may obtain insurance from a private carrier for the payment of damages on account of the injury to or death of persons occurring in connection with the operation of the Department and that a direct action may be had against the insurance company. Title 38, Section 24(1) Code of Alabama 1940 (Recompiled 1958) Appendix A.

The Alabama State Docks Department exercised the authority granted to it and had in effect on the date each of the Petitioners was allegedly injured an insurance policy providing for a direct right of action against the insurance company. To be sure, the injured employees would be compensated in accordance with the Alabama Workmen's Compensation Law, which, like other compensation laws, provides for liability without fault.

Had Congress been afforded an opportunity to consider the issues here presented, it might have adopted legislation which would have accommodated the States' constitutional immunity from suit and the rights of employees.

One District Judge, three Circuit Judges and four Justices of this Court are of the opinion that Alabama did not waive its immunity from suit in 1927 when it commenced the operation of its railway. We submit that where, as here, there is such a lack of unanimity on whether a known constitutional right has been waived and where little injury could result in a decision upholding the right, a sharply divided Court should not by judicial fiat deprive a State of a constitutional right upon which it expressly relied. Under our federal system the legislative branch of the government which represents the will of the people will have ample opportunity to specify in advance upon what conditions a State will be deemed to waive its immunity from suit.

The majority opinion of this Court entirely misconstrued the purpose and effect of the Eleventh Amendment. Contrary to the position taken by the majority, the Eleventh Amendment was not intended to apply solely to actions against States for debts.

The legislative history of the Eleventh Amendment clearly demonstrates that Congress intended to deprive the federal courts of all power to entertain a suit against a State. Nothing appears in the legislative

history which indicates that a State could consent to suit in a federal vis-a-vis a state court.

Attempts were made to water down the Eleventh Amendment on the floor of the House and the Senate.

In the Senate a substitute amendment:

> The judicial power of the United States, *except in cases arising under treaties made under the authority of the United States*, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state. (Emphasis supplied.)

was proposed and defeated. *3 Anna's of Congress* 30 (1794).

A second substitute amendment:

> The judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign state, where the cause of action shall have arisen before the ratification of this amendment.

was proposed and defeated in the Senate. *3 Annals of Congress* 30 (1794).

In the House an amendment was proposed and defeated to add to the end of the Eleventh Amendment the following words:

> Where such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect.

*3 Annals of Congress* 476 (1794).

It is clear that the Senate intended to deprive the federal courts of all power to entertain a suit against a State when it defeated the amendment which would have allowed suits against a State under treaties made by the United States. The power over foreign relations vested in the federal government by the Constitution is certainly supreme even to the power to regulate interstate commerce.

It is equally clear from the proposed amendment in the House that the purpose and intent of the amendment as adopted was to insure that States would never be brought before a federal tribunal under any circumstances.

Contrary to the majority of opinion, this Court has consistently held that the Eleventh Amendment was not confined to suits on debts of States, indeed, the Court has in the past grouped all suits to obtain a money judgment as being directly within the meaning and purpose of the Eleventh Amendment and has consistently interpreted the amendment in its own words to apply to "any suit in law and equity." *Missouri v. Fiske*, 290 U.S. 18, 27:

> The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with

respect to the prosecution of State debts in the Federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited.

A consideration of the all-embracing terms of the Eleventh Amendment in exactly the same light as the majority considered the "all-embracing terms" of the Federal Employers' Liability Act, particularly in view of the known intent of the people in adopting the Eleventh Amendment, compels the conclusion that the Eleventh Amendment is applicable to this cause.

A conclusion that the federal judiciary is not invested with the power, i.e. jurisdiction, to entertain a suit against a State under the Federal Employers' Liability Act will not in any way affect the power of Congress to regulate interstate commerce. The State's constitutional right to immunity and Congress' power to regulate commerce can each be given full effect by Congress providing a cause of action to be brought by the United States against a State for a State's violation of essential regulations of commerce, a policy heretofore adopted by Congress in the Safety Appliance Act, 45 U.S.C.A. 13, 18, 34; Hours of Service Act, 45 U.S.C.A. 63, 66; and the Railway Labor Act, 45 U.S.C.A. 152 Tenth, among others.

Moreover, the majority opinion miscontrues the Amendment and the Constitution in that it assumes that a State may confer jurisdiction on a federal court by consent.

The three cases cited in the majority opinion are inapposite. In none of the cases cited in the majority opinion was a State brought into a federal court as a party defendant. In *Clark v. Barnard*, 108 U.S. 436, the State intervened in an existing action over which the court had already acquired jurisdiction to claim a fund in the hands of the court. The State was never a party defendant; the State was a plaintiff claiming money in the registry of the court, a situation completely outside of the Eleventh Amendment and specifically within the judicial power to entertain an action brought by a State. *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273 was an ancillary proceeding against State officials to obtain the benefits of a judgment in a pending case in which the State was not even a party. The court in *Gunter v. Atlantic Coast Line R. Co.*, carefully pointed out that at most the State was a "privy" to the actual parties of record. The State had authorized a county official over whom the court had jurisdiction to represent the interest of the State in the original action. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 273, is not authority for making a State a defendant in a suit by a citizen in the courts of the United States. The defendant in *Petty* was a corporation created by compact, at most, an agency of two States. Justices Frankfurter, Harlan and Whittaker were of the firm opinion that the court had no power to entertain the suit because of the Eleventh Amendment. Justices Black, Clark and Stewart did not reach the constitutional issue and of the three who reached the constitutional issue in *Petty*, Justice Douglas who wrote the opinion in *Petty*, does not apply *Petty* to this cause.

The court in *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 292, recognized the salient distinction between "the power of courts of the United States to deal, against the *will* and *consent* of a State and the voluntary action of a State in submitting its rights to judicial determination." The *Gunter* decision conclusively establishes that the Eleventh Amendment deprived the federal court of jurisdiction over a suit by an individual against a State. No question of consent is present. Jurisdiction may not be conferred by consent. The only method in which a State can, under the Constitution and the Eleventh Amendment, find itself in a federal court is when the State brings an action or intervenes as a plaintiff, except of course in an action brought by the United States or another State pursuant to the express provision of Article III Section 2 Clause 1 of the Constitution.

The Constitution and the Eleventh Amendment do not permit a State to be "dragged" before a federal court. *Hans v. Louisiana*, 134 U.S. 1, 14.

## CONCLUSION.

For the foregoing reasons it is respectfully urged that the petition for a rehearing be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit be upon further consideration affirmed.

Respectfully submitted,

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## CERTIFICATE AS TO SERVICE.

I, Willis C. Darby, Jr., hereby certify that I have mailed a copy of the foregoing Brief properly addressed to Honorable Al G. Rives and Honorable Timothy M. Conway, Jr., counsel of record for Petitioners, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the 10th day of June, 1964.

WILLIS C. DARBY, JR.

# APPENDIX.

## APPENDIX A.

§ 24(1). Department authorized to carry fire and casualty and public liability insurance.—The department of state docks and terminals is hereby authorized to provide insurance covering loss or damage to its properties, or any properties of others in its custody, care or control, or any properties as to which it has any insurable interest, caused by fire or other casualty; and may likewise provide insurance for the payment of damages on account of the injury to or death of persons, and the loss of or destruction of properties of others; and may pay the premiums thereon out of the revenues of the department. Nothing herein shall be construed to authorize or permit the institution of any suit or proceeding in any court against the department for or on account of any matters referred to in this section; provided, however, that any contracts of insurance herein authorized may, in the discretion of the director of the department, provide for a direct right of action and suit against the insurance carrier for the enforcement of any such claims or causes of action. The liability under any such policy or contract of insurance, arising out of such facts and circumstances as would bring such claim or cause of action within the provisions of chapter 5 of Title 26 of the Code of Alabama of 1940, if the department were subject to the provisions of said law, shall be governed by the provisions of said law; the liability in all other cases under any such policy or contract of insurance, except to the extent expressly stated to the contrary therein, shall be the same as that imposed by law upon private persons, firms or corporations in like circumstances. (1945, p. 689, appvd. July 6, 1945.)